

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Disposition of Down Payments and Pending	)	
Applications for Licenses Won During Auction No. 35	)	
for Spectrum Formerly Licensed to NextWave	)	WT Docket No. 02-276
Personal Communications Inc., NextWave Power	)	
Partners, Inc. and Urban Comm-North Carolina, Inc.	)	

Auction Event No. 35

**COMMENTS**

T-Mobile USA, Inc. (“T-Mobile”)<sup>1</sup> submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) September 12, 2002, public notice seeking comment on the disposition of down payments and pending applications for licenses won in Auction No. 35 that previously were issued to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively “NextWave”) and Urban Comm-North Carolina, Inc. (“Urban Comm”).<sup>2</sup> T-Mobile submits that applicants with pending Auction No. 35 applications for NextWave and Urban Comm licenses (the “Applicants”) should be allowed to withdraw their

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<sup>1</sup> T-Mobile USA, Inc. (formerly known as VoiceStream Wireless Corporation), combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S. with licenses covering approximately 94 percent of the U.S. population and currently serving over eight million customers. T-Mobile and Powertel, Inc. are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both T-Mobile and Powertel are, however, operated together and are referred to in this comment as “T-Mobile.”

<sup>2</sup> FCC Public Notice, *Commission Seeks Comment On Disposition Of Down Payments And Pending Applications For Licenses Won During Auction No. 35 For Spectrum Formerly Licensed To NextWave Personal Communications Inc., NextWave Power Partners, Inc. And Urban Comm -- North Carolina, Inc.*, FCC 02-248 (rel. Sept. 12, 2002).

applications without incurring any penalty, and with the expeditious return, in full, of their down payment monies currently on deposit with the FCC.

## **I. Introduction and Summary**

T-Mobile's wholly owned subsidiary, VoiceStream PCS BTA I License Corporation, was the high bidder for 19 licenses in Auction No. 35 with a total net high bid amount of \$482,653,000. Three percent of the winning bid, or \$14,479,590, remains on deposit with the FCC. T-Mobile also holds an indirect, non-controlling interest in Cook Inlet/VS GSM V PCS, LLC, which was the high bidder for 22 licenses in Auction No. 35, with a total net bid amount of \$506,376,000, of which \$15,191,280 remains on deposit with the FCC. T-Mobile participated in extended settlement efforts late in 2001 that sought to preserve the auction results, and has intervened in support of the Commission in its appeal from the D.C. Circuit Court of Appeals' decision that was argued on October 8, 2002, before the U.S. Supreme Court. Based upon the general state of the wireless communications sector and the fragile capital markets that have continued to deteriorate, especially over the last six months, however, T-Mobile now concludes that the Commission must permit the Applicants to withdraw their pending applications without penalty, and expeditiously return, in full, their down payments.

The Auction No. 35 applications covering the NextWave and Urban Comm licenses have been pending for more than 19 months. It is certain that no final disposition of the licenses will be reached anytime soon. The Applicants have no responsibility for this delay, but have been forced, nonetheless, to operate under a cloud of \$16 billion in contingent liability that has raised substantially their capital costs and hampered their ability to both formulate and implement business plans. Allowing the

Applicants to voluntarily withdraw their applications without penalty would allow them to more readily secure capital for the enhancement of existing wireless systems and services. The Commission's consent to withdrawal would be entirely consistent with the public interest and would not offend the integrity of the Commission's auction process in any way.

## **II. Auction No. 35 Applicants Should Be Permitted To Withdraw Expeditiously Their Pending Applications Without Incurring Default Penalties**

The contingent liability associated with the frozen applications for NextWave and Urban Comm licenses hampers the Applicants' ability to invest in their businesses and compete in today's increasingly distressed marketplace. Allowing the Applicants to withdraw their pending applications would be consistent with the public interest goals set forth in Section 309(j) of the Communications Act, as amended (the "Act"), and would not harm the integrity of the auction process. Moreover, the voluntary withdrawal of these applications should not be subject to the auction default rules, and the Applicants should not incur any penalty as a result of their withdrawals, including any monetary forfeiture or restrictions against rebidding for the licenses in future auctions.

### **A. Circumstance Have Changed Dramatically Since The *Partial Refund Order***

Since the Commission issued the *Partial Refund Order*<sup>3</sup> earlier this year, the capital markets upon which many Applicants rely to obtain financing to pay for licenses and equipment have become acutely distressed. The Dow Jones' and Standard & Poor's ("S&P") indexes, for example, just completed their worst quarter in over a decade.<sup>4</sup>

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<sup>3</sup> *Requests for Refunds of Down Payments Made In Auction No. 35*, 17 FCC Rcd 6283 (2002) ("*Partial Refund Order*").

<sup>4</sup> See, e.g., *For Dow and S&P, Worst Quarter Since '87*, WASH. POST, Oct. 1, 2002, at E1.

Investor confidence in the telecommunications sector in particular has deteriorated substantially due in part to the recent well-publicized bankruptcies of major telecommunications entities. As one article recently summed it:

The \$2 trillion in losses that telecom investors have suffered is twice the damage caused by the bursting of the Internet bubble and on a par with the savings-and-loan crisis of the late 1980s. Bank exposure to the telecom mess is tens of billions of dollars. Worse, the investigations into WorldCom, Global Crossing, and Qwest, layered on top of the Enron scandal, are dealing a huge blow to investor confidence. They've led the entire stock market down as the Standard & Poor's 500-stock index has tumbled 29% [] so far this year.<sup>5</sup>

The telecommunications industry's performance is having a negative impact not only upon private and institutional investors,<sup>6</sup> but also the equipment manufacturers that historically provide alternative sources of financing for the construction of licensees' networks.<sup>7</sup>

The ability of the Applicants to plan for their new and existing license operations has further deteriorated due to the litigation and regulatory gridlock in which they and the NextWave and Urban Comm licenses have become mired. As the recent study released on August 26, 2002, by Greg Sidak of the American Enterprise Institute and Criterion Economics, L.L.C., points out with respect to Auction No. 35:

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<sup>5</sup> Steven Rosenbush et al., *Inside the Telecom Game*, BUS. WK., Aug. 5, 2002, at 34. See also Paul Starr, *The Great Telecom Implosion*, AM. PROSPECT, Sept. 9, 2002, at 20 ("Investors have been giving up: The 89 percent decline in the Dow Jones wireless communications index for the 2 years ending Aug. 7 is particularly shocking for an industry that now has more than 100 million subscribers and should be harvesting the fruits of its growth."); Federal Communications Commission Chairman Michael K. Powell, Remarks at the Goldman Sachs Communicopia XI Conference, New York, NY (Oct. 2, 2002) ("Powell Communicopia Remarks") ("... a retrenchment of capital, continuing credit-rating downgrades, continued cuts in work force and capital expenditures and bankruptcies sadly characterize the day.").

<sup>6</sup> See, e.g., Riva D. Atlas, *Market Place: Bad loans and weak trading will reduce J.P. Morgan Chase's earnings more than expected*, N.Y. TIMES, Sept. 18, 2002, at C11.

<sup>7</sup> See, e.g., Christopher Stern, *Telecom Slump Continues: Lucent, French Firm Report Setbacks*, WASH. POST, Sept. 14, 2002, at E1.

Between the end of Auction 35 in January 2001 and July 2002, the major wireless service providers and equipment manufacturers with operations in the United States lost over \$850 billion, or 65 percent, in market value. Small and mid-sized companies were not spared, as the market capitalization of the suppliers of tower sites and equipment fell by 90 percent, and rural wireless carriers fell almost 84 percent. During that same time period, the telecommunications industry laid off nearly a quarter of a million workers. Making matters worse is the Auction 35 debt that looms over the wireless carriers. The winning bidders from Auction 35 must treat their obligations as contingent liabilities without deriving any benefit from the underlying asset. Those contingent liabilities have raised the carriers' costs of capital, impaired credit ratings, and prompted investment bankers to conclude that Auction 35 has increased uncertainty in the wireless industry.<sup>8</sup>

The distressed state of the capital markets has prompted the Commission to action in other proceedings. For example, the Commission delayed the commencement of Auction No. 46 for six months because the state of the financial markets made it all but impossible for interested telecommunications companies to raise adequate capital to participate in the auction.<sup>9</sup> Problems in the telecommunications sector have become sufficiently worrisome that the Commission conducted an *en banc* hearing to assess the current state of the telecommunications sector and discuss possible remedies to “restore its financial health.”<sup>10</sup> As Robert Konefal, Managing Director of Moody's Investor Service, testified at that hearing, “weak capital markets [] make[] debt refinancing more

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<sup>8</sup> J. Gregory Sidak, *The Economic Benefits Of Permitting Winning Bidders To Opt Out Of Auction 35*, Criterion Economics, L.L.C., at [http://www.criterioneconomics.com/articles/news\\_article21.htm](http://www.criterioneconomics.com/articles/news_article21.htm) (Aug. 26, 2002).

<sup>9</sup> FCC Public Notice, *1670-1675 MHz Band Auction (Auction No. 46) Postponed Until April 30, 2003*, DA 02-2395 (rel. Sept. 25, 2002).

<sup>10</sup> FCC Public Notice, *FCC To Convene En Banc Hearing October 7th on Steps Toward Recovery in the Telecommunications Industry*, DA 02-2443 (rel. Sept. 30, 2002).

challenging,” and “reductions in investment could compromise service quality or delay new product introductions.”<sup>11</sup>

**B. Auction 35 Applicants Have No Reasonable Expectation That The Licenses Will Be Available In The Foreseeable Future**

Neither the Applicants nor the Commission could have anticipated that the Commission would be barred from issuing the licenses for such an extended period of time – 19 months and counting. Even a Commission victory in the U.S. Supreme Court likely would require a remand to the D.C. Circuit Court of Appeals for consideration of other legal challenges raised by NextWave that were not previously decided. Any remand proceedings and further related appeals and regulatory proceedings would extend the licenses’ legal limbo for over a year and, more likely, many more years. The Applicants, meanwhile, should be investing in their businesses and should not be placing business plans indefinitely on hold.

It is patently unfair to handcuff the Applicants’ ability to exercise business decisions while awaiting the fate of the NextWave legal and regulatory proceedings. Given the current state of the telecommunications sector, the Applicants require flexibility to focus on improving their existing networks and investing in new advanced technologies and services, such as T-Mobile’s work with Starbucks Corporation to install WiFi (802.11b) hotspots in its coffee shops throughout the United States. As Chairman Powell recently observed, “[e]conomic recovery in the telecommunications space, as it is for the economy as a whole, rests on spurring capital expenditures.”<sup>12</sup> Yet the Applicants

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<sup>11</sup> Robert Konefal, Statement at the FCC En Banc Hearing on Steps Toward Recovery in the Telecommunications Industry, at 4 (Oct. 7, 2002) (statement available at <http://www.fcc.gov/enbanc/100702/>).

<sup>12</sup> Powell Communicopia Remarks.

have been impaired from pursuing capital and developing new projects precisely because the NextWave quagmire has constricted the availability of capital. The Applicants have acted in good faith throughout Auction No. 35. Applicants timely filed short forms and long forms, made upfront payments and down payments, and even tried valiantly last November and December to reach a settlement with NextWave to preserve the results of Auction No. 35. Having exercised their best efforts to make the Commission's auction process work, the Applicants should not be held liable for the licenses simply because the licenses might, in the distant future, finally become available to them.

**C. Applicants Electing To Withdraw Their Applications Should Not Incur Default Penalties**

Withdrawing Applicants are not in default and should not be subject to default penalties, including any restrictions on rebidding in any future auctions. Applicants' down payments on deposit with the FCC also should be expeditiously returned. Under Commission rules, default occurs when "a winning bidder fails to pay the balance of its winning bid by the late payment deadline."<sup>13</sup> As an initial matter, the Commission is legally barred from making the licenses available to the Applicants, so there is no basis for finding default on missed payment grounds.<sup>14</sup> Further, Applicants that elect to withdraw their Auction No. 35 applications pursuant to a Commission order authorizing such action should not trigger a default situation under 47 C.F.R. § 1.2109(b), because

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<sup>13</sup> 47 C.F.R. § 1.2109(a).

<sup>14</sup> *NextWave Personal Comm. Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, 70 U.S.L.W. 3551 (U.S. 2002).

withdrawals under this section make applicants only “subject to” penalties, which the Commission may modify.<sup>15</sup>

Moreover, there is no policy justification for applying default penalties. The Commission’s default penalties are intended as “incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction.”<sup>16</sup> The default rules are predicated upon Section 309(j)(4)(B) of the Act, which directs the Commission to “include performance requirements, such as appropriate deadlines and penalties for performance failures . . . to promote investment in and rapid deployment of new technologies and services.”<sup>17</sup> The financial qualifications and performance of the Applicants, however, have never been in question, as they were ready, willing and able to complete the licensing process 19 months ago.<sup>18</sup> Further, the NextWave and Urban Comm licenses are already waist-deep in litigation that is completely unrelated to any actions taken by the Applicants.<sup>19</sup> In any event, even if the Commission was to determine that its rules pertaining to default

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<sup>15</sup> See 47 C.F.R. § 1.2104(g)(2).

<sup>16</sup> See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2382 ¶ 197 (1994) (citation omitted) (“*Competitive Bidding Second Report and Order*”). See also *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures*, 13 FCC Rcd 374, 433-34 ¶ 101 (1997).

<sup>17</sup> 47 U.S.C. § 309(j)(4)(B). See also *Competitive Bidding Second Report and Order* at 2382 ¶ 195.

<sup>18</sup> For this same reason, allowing the Auction No. 35 applicants to withdraw their applications would not implicate the purposes of the withdrawal penalties, which are intended to prevent insincere bidding. *Competitive Bidding Second Report and Order* at 2373 ¶ 147.

<sup>19</sup> As the Commission observed in adopting the default rules, “the penalty for default or disqualification should be rationally related to the harm caused, yet be set high enough to deter unwanted conduct.” *Id.* at 2382 ¶ 197.



penalties apply, those rules should be waived based upon the exigent circumstances surrounding the NextWave and Urban Comm licenses.

**D. The Public Interest Will Be Served By Permitting Applicants To Withdraw Their Applications**

Continuing to hold the Applicants liable for licenses that the Commission has no ability to award has become counter-productive and is inconsistent with the public interest. Section 309(j) of the Act directs the Commission to promote “the development and rapid deployment of new technologies, products, and services . . . without administrative or judicial delays” through its competitive bidding rules.<sup>20</sup> In the case of Auction No. 35, strict adherence to these rules has impaired business investments and the deployment of advancements in technologies and services, as the Applicants continue to struggle under the weight of \$16 billion in contingent liability. The punitive effects of this liability and the uncertainty of the legal resolution make it more difficult to fund the build-out of existing networks, which in turn is inconsistent with the public interest goals of developing and rapidly deploying service. Moreover, the existing circumstances not only harm the wireless carriers, but also directly affect other industry sectors, such as equipment suppliers that also are struggling in this economic environment. Consumers are denied the benefits of network upgrades and access to advanced wireless services and products. As Department of Commerce Secretary, Donald L. Evans, stated in his October 10, 2002, letter to Chairman Powell, in which he urged the Commission to expeditiously grant relief to the Applicants:

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<sup>20</sup> 47 U.S.C. § 309(j)(3)(A).

Quick Commission action to grant relief from Auction No. 35, however, would bring much-needed stability to the wireless sector and would allow the sector to focus its resources on meeting the needs of consumers. By restoring certainty, the Commission can lay the foundation for renewed investment, innovation, and job-producing growth, both in the telecommunications industry and in the economy as a whole.<sup>21</sup>

To the extent that the legal hold that has been attached to the NextWave and Urban Comm licenses impairs the development and deployment of advanced wireless services and products, it also stands as a substantial and artificial barrier to competition, contrary to both Section 309(j) of the Act and the Commission's market-oriented spectrum management policies. Further, the existing freeze of Auction No. 35 applications prevents the efficient operation of the secondary market. Specifically, the attractiveness of the Applicants' existing licenses to other carriers seeking to improve and expand their own service footprint, as well as an Applicant's willingness to part with a license it now holds, is contingent upon the disposition of the NextWave and Urban Comm licenses.

**E. The Integrity Of The FCC's Auction Processes Will Not Be Undermined By Permitting Applicants To Withdraw Their Applications**

Allowing the Applicants to withdraw their applications will not impair the integrity of the Commission's auction processes. The Applicants have not received any benefit or unjust enrichment. To the contrary, the Applicants have lost substantial sums in foregone interest accrued on the deposits paid for the licenses without the benefit of their use –

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<sup>21</sup> Letter from Donald L. Evans, Secretary, Dep't of Commerce, to the Honorable Michael K. Powell, Chairman, Federal Communications Commission (Oct. 10, 2002) (letter available at [http://www.commerce.gov/opa/press/2002\\_Oct10\\_Evans\\_letter\\_FCC.htm](http://www.commerce.gov/opa/press/2002_Oct10_Evans_letter_FCC.htm)).

while simultaneously facing higher prices for capital due to the contingent liability. Further, permitting the Applicants to withdraw their applications raises no concerns about speculative bidding, as their good faith efforts to preserve the Auction No. 35's results described above make clear. In short, this is not a situation in which the Applicants are seeking to evade an obligation to pay bid amounts, but rather one in which a legal and regulatory quagmire and deteriorating financial and market conditions require the Commission to allow the Applicants to withdraw their applications without penalty. Finally, in the event that the NextWave and Urban Comm licenses are returned to the Commission subsequent to Applicants' withdrawal of their applications, the Commission can simply reauction them, following whatever auction procedures it adopts at that time.

### **III. Conclusion**

The Applicants have acted in good faith to preserve the integrity of Auction No. 35. The contingent liability associated with the NextWave and Urban Comm licenses, however, has impaired the Applicants' ability to obtain capital in today's depressed economy which, in turn, has impaired their ability to invest in the development and deployment of advanced wireless services and products. The Applicants are not responsible for the legal and regulatory proceedings that have delayed the granting of these licenses by more than 19 months. Accordingly, T-Mobile urges the Commission to permit the Applicants to withdraw their applications expeditiously without incurring any form of default penalty, including any restrictions on rebidding in any future auctions, and with the expeditious return, in full, of their down payment monies currently on deposit with the FCC.

Respectfully submitted,

/s/ Brian O'Connor

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